

International Investment Agreements and Human Rights

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Written version of the oral position presented in the consultation by
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Importance of FDI for German Industry and Society

Almost one-third of Germany's GDP is generated by German industry and industry-related services. The BDI is the umbrella organization of German industry. It speaks for 40 trade associations and more than 100,000 enterprises with around 8 million employees.¹

German investors hold investment stocks in other countries (FDI Stocks) valued at €1.3 trillion. Worldwide, German business represents 5 percent of the world's direct investment stocks.² Through foreign direct investment (FDI), German investors are involved in 39,000 companies abroad and are responsible for 7.9 million jobs abroad.³ This means that our companies are responsible for about as many jobs abroad as they employ at home in Germany. Our companies generate an annual turnover of €3 trillion abroad through their foreign investments. This is almost three times more than our companies export each year.⁴

FDI is not only important for industry. We need private FDI to recover from the Covid-19 crisis, as well as to cope with the climate crisis and to reach the SDGs. Private investors are required to fill a gap of \$2.5 trillion – per year. Progress on investment in the SDGs in developing countries is evident across six out of ten

¹ More information about the BDI here: < <https://english.bdi.eu/bdi/about-us/> >.

² UNCTADStat < <https://unctadstat.unctad.org/EN/> > (accessed April 8th, 2021).

³ Deutsche Bundesbank, Direktinvestitionsstatistiken 2020 < <https://www.bundesbank.de/resource/blob/804078/782bb5525488dfc1d7fe0dbba1650954/mL/0-direktinvestitionen-data.pdf> > (accessed April 8th, 2021).

⁴ Deutsche Bundesbank, Direktinvestitionsstatistiken 2020 < <https://www.bundesbank.de/resource/blob/804078/782bb5525488dfc1d7fe0dbba1650954/mL/0-direktinvestitionen-data.pdf> > (accessed April 8th, 2021).

SDG sectors, including infrastructure, climate change mitigation, food and agriculture, health, telecommunications, and ecosystems and biodiversity.⁵

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The Ability to Invest Abroad, the Rule of Law and IIAs/BITs

From the investors perspective, FDI is always a risky business – particularly for SMEs, which make up 95 percent of German industry. A study showed that the biggest obstacle to German SMEs when investing abroad is the lack of legal certainty. Nearly half of the companies (43 percent) have problems with this obstacle.⁶

International Investment Agreements (IIAs), Bilateral Investment Treaties (BITs) or investment chapters in free trade agreements (FTAs) offer a high level of legal protection. They strengthen the rule of law and lower risks significantly. Germany was the first country to sign a BIT and has signed approximately 127 treaties according to UNCTAD.⁷

Need for Reform in IAAs and Human Rights

Around 3,000 IAAs have been concluded between states worldwide. FDI are becoming increasingly important not only for Germany, but also for the entire global economy. Globally, FDI stocks increased fourteen-fold between 1990 and 2018. At the same time, direct investment is becoming increasingly important for the economy. In 1990, global FDI stocks still accounted for 10.1 percent of global GDP, growing to 22.8% in 2000 and 36.7% in 2018.⁸ Foreign investments are an integral part of the modern, globalized economy. The prosperity and future prospects in all countries of the world depend on them.

However, in recent years, BITs have been increasingly criticized. It is feared that BITs restrict the policy space of states, which states need to protect human rights, the environment, national security, or public health. Furthermore, there were cases in which BITs were abused by companies. While some of the criticism might be justified, the solution, of course, cannot be to abolish ISDS. Rather, it is important to design IIAs in such a way that both investments and human rights can be protected.

⁵ UNCTAD World Investment Report 2020, < <https://worldinvestmentreport.unctad.org/world-investment-report-2020/ch5-investing-in-the-sdgs/> >; UNCTAD SDG Investment Trends Monitor 2020 < https://unctad.org/system/files/official-document/diaemisc2020d3_en.pdf > (accessed April 8th, 2021).

⁶ KfW/Creditreform (2012), *Internationalisierung im deutschen Mittelstand*, < <https://www.kfw.de/Download-Center/Konzernthemen/Research/PDF-Dokumente-Studien-und-Materialien/Nr.-3-Internationalisierung-im-deutschen-Mittelstand-LF.pdf> > (accessed on 08.07.2017), p 35f.

⁷ UNCTAD IIA Navigator, < <https://investmentpolicy.unctad.org/international-investment-agreements> > (accessed April 8th, 2021).

⁸ UNCTADStat < <https://unctadstat.unctad.org/EN/> > (accessed April 8th, 2021).

Some fundamental work has been done to offer options on the future design of IIAs. Some valuable ideas in this field were presented by UNCTAD. In its Global Action Menu for Investment Facilitation, UNCTAD has summarized ten important points.⁹ Investment policies must be transparent and the laws and regulations easily accessible to investors. Politicians must be open for dialogue for all stakeholders including companies. Investors need to have a clearly defined contact point or persons and all questions must be answered before an investment can be made.

The European Union has implemented some new concepts in its latest BITs and more precisely, in the investment chapters of the EUs FTAs. Here, the states' right to regulate is secured in important policy fields. For example, in CETA, the economic agreement with Canada, we find formulations which secure policy space e.g. in Articles 8 and 28 (more specifically Articles 28.3.1 and 28.3.2(b)).¹⁰

Protection of Human Rights and of FDI Vital

German industry welcomes such approaches. Reform proposals like the UNCTAD proposals can protect human rights, promote the acceptance of ISDS and thus facilitate FDI. The BDI welcomes the European reform-oriented approach to investment protection.¹¹

At the same time, however, a consistently high level of protection for investments must be guaranteed. Because one thing cannot be changed: The ability of companies to invest abroad depends on the level of legal certainty.

⁹ UNCTAD (2016), *Global Action Menu for Investment Facilitation*, Geneva, p. 5-7.

¹⁰ European Commission, CETA chapter by chapter, < https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/index_en.htm > (accessed April 8th, 2021).

¹¹ BDI, International Investment Agreements Indispensable to Protect Investment Abroad, < <https://english.bdi.eu/article/news/international-investment-agreements-indispensable-to-protect-investment-abroad/> >; BDI, Investment Protection: Modern Investment Protection Chapter in Free Trade Agreement with Vietnam, < <https://english.bdi.eu/topics/global-issues/foreign-direct-investments/#/article/news/investment-protection-modern-investment-protection-chapter-in-free-trade-agreement-with-vietnam/> >; BDI, Investment Protection in TTIP, < <https://english.bdi.eu/publication/news/investment-protection-in-ttip/> > (accessed April 8th, 2021).